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Supreme Court, U.S.
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No. 87-6997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE JOHN CARELLA,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

On Appeal From The Appellate Department Of The Superior Court of California, County of Los Angeles

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BRIEF OF APPELLANT

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(Appointed by this Court)
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QUESTIONS PRESENTED

1. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Vehicle Code § 10855, that an individual who fails to return a rental car within five days after the rental agreement has expired "shall be presumed to have embezzled the vehicle."

2. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Penal Code § 484(b), that "intent to commit theft by fraud is presumed" if a lessee fails to return leased property within 20 days of demand.

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OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court State of California, County of Los Angeles is unreported and is reprinted in the Joint Appendix (JA) at 60. The order denying appellant's petition for rehearing and application for transfer, also unpublished, is reprinted at JA 75.

JURISDICTION

The judgment of the Appellate Department of the Superior Court State of California, County of Los Angeles was entered on February 3, 1988. The petition for rehearing and application for transfer to the Court of Appeals of California were denied on February 24, 1988, thus rendering the Appellate Department the highest court in the State for purposes of this appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (repealed). This Court noted probable jurisdiction on November 7, 1988. By an amending order issued on November 17, 1988, the Court limited review to Questions I, II, III, IV, V, and VII of Appellant's Jurisdictional Statement.

STATUTES INVOLVED

This case involves the validity under the Due Process Clause of two California statutes. Cal. Vehicle Code § 10855 provides as follows:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Cal. Penal Code § 484(b) provides as follows:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if

> one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

The United States Constitution, Fourteenth Amendment, Section 1, provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Appellant was convicted of grand theft for failing to return a rented car by the date set out in the rental agreement. The question presented is whether two California statutes, pursuant to which the jury was instructed to presume commission of the offense from the prosecution's proof of certain predicate facts, denied appellant due process of law.

1. Under California law, the illegal appropriation of an automobile can give rise to one of several distinct offenses. Vehicle Code § 10851 provides that any non-consensual taking of a vehicle is a "public offense" if undertaken with a specific "intent either to permanently or temporarily" deprive the owner of title or possession. Alternatively, the taking of a vehicle can constitute "grand theft" in violation of Penal Code §§ 484(a) & 487(3).[1] For present purposes, the principal distinction between a violation of Cal. Vehicle Code § 10851 and grand theft auto lies in the element of intent. Whereas the former authorizes conviction even if

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[1] Section 484 defines the crime of theft generally. Penal Code § 486 provides that theft can be either "petty" or "grand." Theft of an automobile is automatically characterized as grand. Penal Code § 487(3).

the defendant intended only a temporary deprivation, the latter has long been interpreted to require a specific intent to "deprive the owner of the automobile permanently." *People* v. *Pater*, 267 Cal. App. 2d 921, 73 Cal. Rptr. 823, 825 (3d Dist. 1969).[2]

In cases involving the illegal retention of a rented automobile, California prosecutors are given the benefit of two statutory presumptions. Vehicle Code § 10855 provides that whenever a person has "willfully and intentionally" failed to return a rental vehicle within five days after the expiration of the rental agreement, "that person shall be presumed to have embezzled the vehicle." Although housed in the Vehicle Code, Section 10855 bears on the crime of "embezzlement," a species of grand theft.[3] Thus, proof of the predicate fact—intentional failure to return a car within five days of a rental agreement's expiration—generates a presumption with respect to *all* of the constituent elements of the offense. In contrast, the presumption set out in Penal Code § 484(b) bears only on the element of intent.[4] Under its terms, "intent to commit

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[2] This distinction is enshrined in the pattern jury instruction for both offenses. *See*, CALJLIC 14.37 (1972 Revision). Those instructions were read to Appellant's jury. JA 8.

[3] *See, e.g.*, *People* v. *Starkey*, 234 Cal. App. 2d 822, 44 Cal. Rptr. 738, 742 (2d Dist. 1965). As in many states, the generic crime of "theft" in California is a relatively recent legislative development intended to supplant and incorporate the pre-existing offenses of larceny, larceny by fraud or trick, and embezzlement. *See People* v. *Eitzen*, 43 Cal. App. 3d 253, 262, 117 Cal. Rptr. 772, 777 (1st Dist. 1974). The trial court in the present case specifically instructed the jury that embezzlement was a form of theft. JA 10.

[4] The relationship between Penal Code § 484(b) and Vehicle Code § 10855 is far from clear on the face of the statutes. Penal Code § 484(b) begins with the phrase "[e]xcept as provided in Section 10855

theft by fraud is presumed" when the lessee of personal property fails to return it within 20 days after the lessor makes a written demand by certified or registered mail. The demand must be made within 30 days of the expiration of the lease and is deemed "proper" if sent to the address provided by the lessee as well as "any other known address." Penal Code § 484(e).

If implemented as intended, both statutory presumptions operate to shift the burden of production to the defendant upon the State's proof of the predicate facts. Penal Code § 484(d); *People* v. *Hemmer*, *supra*, 19 Cal. App. 3d at 1061, 97 Cal. Rptr. at 521-22. A separate provision of California law provides that "[t]he effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its non-existence." Cal. Evidence Code § 604.

2. On June 25, 1985, appellant was charged by criminal complaint with grand theft (Penal Code § 487(3)) and a violation of Vehicle Code § 10851. JA 3-4. The charges arose out of appellant's failure to return a rented car within the time specified in the rental agreement.

The State's evidence at trial showed that appellant had rented an automobile from the MPG Rental Company on

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of the Vehicle Code." Because § 484(b) covers leased property generally, while § 10855 is limited exclusively to rental vehicles, the legislature may well have intended that only the latter, more specific provision apply in cases involving vehicles. Whatever the intent, however, California juries in rental vehicle cases are typically instructed on both presumptions. *See, e.g.*, *People* v. *Hemmer*, 19 Cal. App. 3d 1052, 97 Cal. Rptr. 516 (4th Dist. 1971). Consistent with that apparent trend, the trial court in the instant case included both statutory presumptions in its charge to the jury. JA 15.

March 25, 1985, but had exchanged it the following day. At the time of the exchange, he left a $400.00 deposit and signed a standard rental agreement pursuant to which he agreed to return the vehicle on or before April 26, 1985. JA 36-38. Prior to the expiration date, appellant telephoned MPG and was given permission to extend the agreement until May 3, 1985. When the car was not returned by that date, the owner of MPG made a number of efforts to contact appellant. Having failed to reach him by telephone, the owner sent a registered demand letter to each of the two addresses provided by appellant at the time of the initial rental.[5] JA 37. When these too elicited no response, the owner reported the car as stolen. Appellant was arrested on June 27, 1985. The automobile was recovered the same day in the parking lot adjoining appellant's business address. *Id.*

Appellant represented himself at trial. In addition to cross examining all of the State's witnesses, he offered the testimony of Jennifer Ayres, a cadet at the Beverly Hills Police Department, and Paula Pfister, his fiancee. Ms. Ayres testified that she was on duty on June 3, 1985, but was unable to corroborate appellant's assertion that he had telephoned that evening to talk to the detective who had been inquiring about the status of the rental car.[6]

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[5] The letter sent to appellant's residence was returned marked "[m]oved with no forwarding address." Although the second letter was not returned, the State offered no direct evidence to confirm that appellant had in fact received it. *See generally* JA 37.

[6] The "Settled Statement on Appeal" states that Ms. Ayres testified that she "had no memory of whether Appellant telephoned Detective Schwab." JA 38. Appellant attempted to put this testimony in context in his appellate brief below. His purpose in pursuing this line of questioning was to demonstrate that his conduct was inconsistent with an intent to deprive the owner of the car permanently. Appellant's Brief 13-14.

The precise content of Ms. Pfister's testimony remains the subject of some dispute. In an affidavit filed in the appellate court below, she described her prior testimony as follows: On May 11, 1985 she accompanied appellant to the offices of MPG Car Rental. At the time he "had substantial monies with him . . . for the purpose of making further and additional payments on his account." Upon discovering that no one was in the office, appellant stopped at an adjoining gas station to inquire if anyone there could accept payment. When he learned that no one could do so, he purchased gasoline and departed. JA 66.[7] In contrast, the "Settled Statement on Appeal"—which was prepared unilaterally by the prosecution and adopted without change by the trial court—describes her testimony in somewhat different terms.[8] According to that

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[7] Ms. Pfister's declaration was filed with appellant's Petition for Rehearing, part of the judgment noticed in appellant's appeal to this Court.

[8] The content of the appellate record in this case was the subject of protracted litigation below. Under California law, an appellant in a criminal matter is entitled to a record of "sufficient completeness to permit appellate scrutiny." *People* v. *Jenkins*, 55 Cal. App. 3d Supp. 55, 61, 127 Cal. Rptr. 870, 873 (Cal. App. Dep't Super. Ct. 1976), (citing *Coppege* v. *United States*, 369 U.S. 438 (1962)). An appellant "may choose to rely on a transcript" rather than an agreed statement of facts and, if indigent, is entitled to free transcription where "such record is essential to the appeal." 55 Cal. App. 3d Supp at 62, 127 Cal. Rptr. at 874. *See generally* California Rule of Court 183 *et seq.* Appellant gave notice of his intention to proceed by transcript, but did not succeed in making the necessary arrangements, in part, he contends, because he was arrested for contempt when he was attempting to do so. JA 42. At the direction of the Appellate Department, the trial court then set a schedule pursuant to which the parties would meet in open court to work out a "settled statement on appeal." Appellant failed to attend the scheduled hearing, later claiming that he had not been given notice of it. JA 45. Notwithstanding

document, she testified that on Saturday May 11, 1985 she accompanied appellant to a gas station near the MPG offices. At the time, she knew that Appellant had "a large amount of cash with him," but "did not know what he was going to do with the money." JA 38.

At the close of appellant's evidence, the court instructed the jury on the elements of the two offenses charged in the complaint. In particular, the jury was instructed: that all forms of theft require a specific intent to deprive the rightful owner of property permanently; that embezzlement is a form of theft; that conviction under Vehicle Code § 10851 would be authorized upon proof of an intent to deprive the owner of temporary possession; and that the defendant could not be convicted of both offenses. JA 6-10.

In addition, at the State's request—and over appellant's objection—the court charged the jury with the presumptions set out in Vehicle Code § 10855 and Penal Code § 484(b).[9] With respect to the former, the jury was told that a "[w]henever any person . . . willfully and intentionally fails to return" a rented vehicle within five days of the expiration of the rental agreement, "that person shall be presumed to have embezzled" it. JA 15. With respect to the latter, the jury was instructed that "[i]ntent to commit theft by fraud is presumed" if one who rents the personal

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appellant's absence, the trial court accepted verbatim the prosecution's written statement of facts and "certified" it as the record on appeal. Appendix of Motion of Appellee to Dismiss at App. 13. Appellant's motion to strike the settled statement was denied JA 48.

[9] It is undisputed that the instructions were intended as applications of Vehicle Code § 10855 and Penal Code § 484(b). The State cited the two statutory provisions when it submitted the proposed instructions to the trial court, and the instructions closely track the language of the statutes.

property of another fails to return it within 20 days of written demand by registered mail. *Id.* Beyond these explicit directions, the jury was given no further guidance on how the presumptions were intended to operate.

After a period of deliberation, the jury returned to the courtroom to ask for further clarification on the presumptions. A handwritten note signed by the foreman posed the following questions:

> In Count I [grand theft], does the presumption of 'intent,' as stated by the Court, include the legal requirement of '*permanent* deprivation of possession'? Is it considered permanent if he keeps the car over five days of the contract date? Or 30 days?

JA 23 (emphasis in original). The court responded by rereading the relevant portions of the original instructions, and the jury again retired.[10] After only nine minutes of additional deliberation, the jury found appellant guilty of grand theft. The court sentenced him to three years formal probation, the terms of which included six months in county jail and payment of restitution.

Appellant filed a timely appeal, contending that both of the statutory presumptions on which the jury had been instructed contravened the Fourteenth Amendment to the Federal Constitution. At the same time, he began a series of fruitless efforts to obtain the trial transcript.[11]

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[10] The docket sheet indicates that the jury "return[ed] to court for questions," and that "partial" instructions were read in response. Because the trial transcript is unavailable, *see infra* n. 11, there is no more precise indication of the details of the court's response.

[11] *See supra* n.8. The transcript is now unavailable. On inquiry from the Clerk's Office of this Court, it was discovered that the reporter who recorded the proceedings has since been dismissed and later moved without leaving a forwarding address.

These efforts culminated in a motion to the Appellate Department in which he declared his indigency and contended that the transcript was essential to his ability to prosecute an effective appeal. JA 49-50. The motion was denied by order on January 29, 1988.

On February 3, the Appellate Department issued a memorandum opinion affirming the judgment of the trial court in all respects. In its brief, the State had conceded that—regardless of the underlying intent of the statutory presumptions—the instructions premised on them had "erroneously" directed a conclusive presumption on an element of the offense. Brief of Respondent at 5, cited in Motion to Dismiss at 10 n.11. Disregarding that concession, the court held that the challenged presumptions "require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence." JA 61. Because appellant "never offered testimony concerning the nonexistence of the presumed facts," the court concluded, the presumptions were not infirm. *Id.*[12]

Appellant moved for rehearing and for leave to transfer the case for further appellate review. The motion renewed the request for the transcript, both as an independent claim and as a basis for granting reconsideration of the February 3, 1988 memorandum opinion. The motion was denied on February 24, 1988. Appellant appealed from both orders, and this Court noted probable jurisdiction limited to six questions pertaining to the constitutional validity of Penal Code § 484(b) and Vehicle Code § 10855.

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[12] Although it did not cite the Federal Constitution directly, the opinion distinguished two prior California cases in which the presumptions had been held unconstitutional under the Fourteenth Amendment. JA 62.

SUMMARY OF ARGUMENT

1. The Due Process Clause guarantees that a criminal defendant may not be deprived of liberty unless the prosecution proves every element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). As appellee conceded in the court below and again in its Motion to Dismiss, the trial court's instructions, given pursuant to Penal Code § 484(b) and Vehicle Code § 10855, violated this "bedrock" constitutional principle. *Id.* at 363. By directing the jury to presume "embezzlement" and the constituent element of specific intent from proof of certain predicate facts, the prosecution was able to secure a conviction without proving its case. Instructions that could be "reasonably . . . understood" as directing such conclusive presumptions are patently unconstitutional—whether or not the intended operation of the presumption was merely to shift the burden of production. *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985); *Sandstrom* v. *Montana*, 442 U.S. 510, 515-17, 521-23 (1979).

Although appellee's concession is sufficient to dispose of the case, the challenged provisions are no less infirm even if the pertinent question were the constitutionality *per se* of presumptions that shift the burden of production to the defendant on an element of the offense. By directing the jury to find an element unless the defendant offers some quantum of evidence in rebuttal, such presumptions are generally invalid for the same reason as those that shift the burden of persuasion: they permit a conviction even if the prosecution failed to prove its case beyond a reasonable doubt. *See Francis* v. *Franklin*, *supra*, 471 U.S. at 317. Given the relative ease with which a burden of production can be satisfied, it may well be permissible to require a defendant to go forward with evidence pertain-

ing to such mitigating considerations as "heat of passion" or self defense—whether or not formally denominated an affirmative defense under the applicable state scheme. But where, as here, a presumption shifts the burden of production on the core elements of specific intent and the *actus reus* itself, it compromises the *Winship* right substantially, without serving any legitimate purpose at all.

Moreover, the presumption set out in Vehicle Code § 10855 is unconstitutional for a second reason as well. Even when a presumption operates to shift the burden of going forward, due process requires a "rational connection" between the predicate and presumed facts. *Tot* v. *United States*, 319 U.S. 463, 467 (1943). Because it cannot be said with "substantial assurance" that the willful retention of a rental vehicle five days beyond the scheduled return date implies a specific intent to keep it *permanently*, Vehicle Code § 10855 is invalid on its face. *Leary* v. *United States*, 395 U.S. 6, 36 (1969).

2. Appellee's contention that the constitutional error was harmless under *Chapman* v. *California*, 386 U.S. 18 (1967), is untenable. Unlike mandatory rebuttable presumptions, *see Rose* v. *Clark*, 478 U.S. 570 (1986), an instruction that directs a conclusive presumption on an element of the offense can never be harmless. In any event, even if the violation in this case were appropriate for harmless-error review, the result would be the same. Although the issue was not addressed by the court below, the record demonstrates, *first*, that the evidence of a specific intent to keep the car permanently was inconclusive at best and, *second*, that appellant's jury actually harbored a reasonable doubt on the issue and, for that reason, did rely on the impermissible presumptions as a basis for the conviction. Under these circumstances, appellee cannot begin to shoulder *its* burden of demon-

strating that the error was harmless beyond a reasonable doubt.

ARGUMENT

I. BECAUSE THE TRIAL COURT'S INSTRUCTIONS PURSUANT TO VEHICLE CODE § 10855 AND PENAL CODE § 484(b) COULD HAVE BEEN REASONABLY INTERPRETED AS DIRECTING A CONCLUSIVE PRESUMPTION ON ONE OR MORE ELEMENTS OF THE OFFENSE, APPELLANT WAS DENIED DUE PROCESS OF LAW.

A presumption is an evidentiary device pursuant to which a jury is instructed that it may or must infer proof of one or more elements of an offense from proof of certain predicate facts. *See generally County Court of Ulster County* v. *Allen*, 442 U.S. 140, 156-60 (1979). Although presumptions are a "staple" of the criminal law, *id.* at 156, their use in any given case must be tested against the "bedrock, axiomatic and elementary" Fourteenth Amendment principle that the State must prove "beyond a reasonable doubt [] every fact necessary to constitute the crime." *In re Winship*, *supra*, 397 U.S. at 363-64 (internal quotations omitted). To the extent a "reasonable juror" could have interpreted the instructions as relieving the prosecution of its constitutional duty to prove its case beyond a reasonable doubt, a conviction cannot stand. *Francis* v. *Franklin*, *supra*, 471 U.S. at 315; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 514.

Application of these principles requires a "straightforward" two-part inquiry. *Francis* v. *Franklin*, *supra*, 471 U.S. at 313. Because the term "presumption" subsumes a variety of evidentiary devices, the analysis begins with a careful determination of the kind of presumption at issue in the case. *See generally County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 157-63.

Once that determination is made, the reviewing court must then assess the precise presumption involved against the fundamental requirement that the prosecution "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson* v. *New York*, 432 U.S. 197, 210 (1977). Under this analysis, as we now show, the statutory presumptions presented to appellant's jury were plainly unconstitutional.

A. A Reasonable Juror Could Have Interpreted The Trial Court's Charge As An Impermissible Conclusive Presumption.

Determining the species of presumption at issue in a given case "requires careful attention to the words actually spoken to the jury." *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 514. Because it is the jury, and not the court, that actually applies the charge, the inquiry focuses on the manner in which the jurors themselves might have understood their directions. *Francis* v. *Franklin*, *supra*, 471 U.S. at 313-14; *California* v. *Brown*, 479 U.S. 538, 541 (1987). For that reason, the private understanding of the trial judge or, in the case of a statutory presumption, the actual intent of the legislature that enacted it, are irrelevant. *See Sandstrom* v. *Montana*, *supra*, 442 U.S. at 515-17. Regardless of any such intent, "whether a defendant has been accorded his constitutional rights depends on the way in which a reasonable juror could have interpreted the instruction" as a whole. *Id.* at 514.

As appellee has twice conceded, the jury in this case could have reasonably construed the instructions as requiring a conclusive presumption of grand theft from proof of the predicate facts specified in Vehicle Code §

10855 and Penal Code § 484(b).[13] Indeed, the instruction is not merely susceptible of that interpretation, it virtually demands it. Having first been told that "embezzlement" was a form of theft, JA 10, the jury was instructed that anyone who fails to return a vehicle within five days after the expiration of a rental agreement "*shall be presumed to have embezzled [it].*" JA 15 (emphasis added). Similarly (although perhaps redundantly), the court charged the jury that "intent to commit theft by fraud is presumed" from failure to return rental property within 20 days of demand. JA 15. In both instances, the charge was "cast in the language of command." *Francis* v. *Franklin*, *supra*, 471 U.S. at 316. Because a reasonable juror could have interpreted the instructions as conclusively directing him or her to find appellant guilty of grand theft, the constitutionality of the charge must be evaluated in those terms.[14]

In this regard, as appellee has also conceded, it is of no consequence that California courts have long interpreted

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[13] Motion of Appellee to Dismiss at 10. ("A reasonable juror could . . . have interpreted the presumptions embodied in the instructions as conclusive or mandatory.") In its appellate brief below, appellee stated: "[T]he trial court erroneously instructed the jury with respect to the presumption because it failed to clearly indicate that the jury might have, but was not required, to infer the intent to commit theft by fraud." *Id.* at 10 n.11.

[14] There is nothing in the rest of the instructions to soften the trial court's concrete directive concerning the presumptions. Although the jury was given a general "reasonable doubt" charge, JA 21, this Court has twice held that such a charge is not "rhetorically inconsistent" with an impermissible conclusive presumption. *Francis* v. *Franklin*, *supra*, 471 U.S. at 318-19; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 518 n.7. The jury could well have interpreted the presumption as a means by which the requirement of proof beyond a reasonable doubt could be satisfied. 471 U.S. at 318-19; 442 U.S. at 518 n.7.

the challenged presumptions to shift only the burden of production. Motion of Appellee to Dismiss at 9-10. As we discuss more fully below, even if analyzed in those terms, the presumptions do not withstand scrutiny under the Due Process Clause. *See infra* pp. 17-35. But, as was the case on two prior occasions, the Court need not reach that issue given the substantial (and acknowledged) risk that the jury understood the charge as directing a conclusive presumption of guilt. *See Francis* v. *Franklin*, *supra*, 471 U.S. at 315 n. 3; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 515-16.

The Court's unanimous opinion in *Sandstrom* is particularly instructive on this point. There, the State of Montana had contended that under established state-law precedent the presumptions at issue served merely to transfer the burden of production to the defendant. Dismissing the argument, the Court held that—while state courts were the ultimate expositors of the meaning of state law—federal courts were the "final authority on the interpretation which a jury could have given the instruction." 442 U.S. at 516-17. Because the instructions could be reasonably construed as directing a conclusive presumption, the Court held, their constitutionality must stand or fall on those terms—regardless of the intent of state law in the abstract. For precisely the same reasons—whatever may be the unarticulated intention of the underlying statutory provisions—the analytic focus of this case derives from the significant likelihood that appellant's jury interpreted the charge as directing a conclusive presumption of guilt.

B. Because The Instruction Could Have Been Reasonably Interpreted As A Conclusive Presumption, It Deprived Appellant Of Due Process Of Law.

The second part of the inquiry—whether the presumption, as construed, comported with due process—need

not detain the Court long. A presumption's validity turns in large part on the degree to which "the device curtails the factfinder's freedom to assess the evidence independently." *County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 156. Thus, a purely permissive inference—*i.e.*, where a jury is told that it may, but is not required to, assume a relationship between proof of certain predicate facts and an element of the substantive offense—does not run afoul of *Winship*'s command since the prosecution must still prove the relationship between the predicate fact and the suggested conclusion beyond a reasonable doubt. In contrast, a charge that directs jurors to conclusively presume proof of an element solely on the basis of proof of a predicate necessarily relieves the prosecution of its constitutional obligation to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime." *In re Winship*, 397 U.S. at 364. For that reason, as the Court has repeatedly held, such instructions are categorically prohibited by the Fourteenth Amendment.[15]

Appellee concedes that the jury could have interpreted the trial court's instructions as directing a conclusive presumption and, further, that such presumptions are categorically unconstitutional. In light of these concessions, which are fully supported by the record, the analysis need go no further.

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[15] *See, e.g.*, *Francis* v. *Franklin*, *supra*, 471 U.S. at 317; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 521-23; *Morissette* v. *United States*, 342 U.S. 246, 274-75 (1952). *Cf. Yates* v. *Aiken*, 108 S.Ct. 534 (1988); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435, 446 (1978).

II. PENAL CODE § 484(b) AND VEHICLE CODE § 10855 VIOLATE DUE PROCESS EVEN IF THE CONCLUSIVE PRESUMPTIONS THEY AUTHORIZE DISSIPATE WHEN A DEFENDANT PRODUCES EVIDENCE IN SUPPORT OF THE NON-EXISTENCE OF THE PRESUMED FACT.

The opinion of the court below could be read to suggest that even if the charge directed the jury to conclusively presume one or more elements of the crime, it was permissible because appellant could have eliminated the presumption by producing evidence to "support . . . the nonexistence" of the presumed fact. JA 61. As discussed above, we believe that any such analysis is foreclosed by the decisions of this Court holding that the dispositive issue is not the intended *operation* of the presumption, but the manner in which its *presentation* might have been interpreted. *See infra* pp. 15-18. In any event, as we suggest in the sections that follow, the Appellate Department's apparent reasoning is incorrect for at least two reasons.

First, although the Court has not yet had an opportunity to test a presumption that shifts the burden of production against *Winship*'s command, Vehicle Code § 10855 and Penal Code § 484(b) clearly compromised appellant's right to have the prosecution prove every element of the offense beyond a reasonable doubt. We do not question that a state, consistent with Due Process, may impose on a criminal defendant the duty to go forward with evidence of an affirmative defense, such as sanity, duress or "heat of passion." Indeed, it may well be permissible to require a defendant to adduce some quantum of evidence pertaining to such mitigating considerations even if not formally denominated an affirmative defense under the applicable state code. Because, in the ordinary run of cases, the facts relating to such considerations are

not in issue in the absence of some indication from the defendant that he contests them, requiring him to bear the burden of production serves a legitimate "housekeeping" function while burdening the *Winship* right very little. But where, as here, the presumed fact concerns the core element of specific intent and where the state already has notice that the element is contested, requiring the defendant to supply rebuttal evidence to avoid a conclusive presumption burdens the right substantially, while serving no legitimate purpose at all.

Second, as a corollary to the *Winship* right, it has long been held that due process requires a tight logical connection between the predicate and presumed facts. *Tot* v. *United States*, 319 U.S. 463, 467 (1943). The requisite degree of tightness depends on the manner in which the presumption operates. *County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 166-67. Where the presumption requires, rather than permits, the jury to presume an elemental fact from proof a predicate, "the fact proved" must be "sufficient to support the inference of guilt beyond a reasonable doubt." *Id.* at 167. If, however, the suggested inference is purely permissive, it will survive a due process challenge if "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States*, *supra*, 395 U.S. at 36. While a presumption that shifts the burden of production does not fit neatly into either category, the manner in which the presumptions operated in this case suggests application of the higher of the two standards. Even under the more forgiving test reserved for permissive inferences, however, it cannot possibly be "said with substantial assurance" that willful retention of a rental car five days beyond the scheduled return date implies an intent to keep it *permanently*.

A. Directing The Jury To Presume All Of The Constituent Elements Of Embezzlement Unless Appellant Offered Sufficient Evidence To Support Their Nonexistence Violated The Due Process Requirement Of *In Re Winship*.

The universe of criminal presumptions is divided into two parts: those that *permit* the jury to infer a relationship between a predicate and an elemental fact, and those that *direct* the jury to infer the relationship—either conclusively or until such time as the defendant offers some quantum of evidence in rebuttal. *See generally County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 156-60. Even if the defendant is allowed to rebut the otherwise conclusive inference, presumptions in the latter category, which are described as "mandatory," clearly implicate the *Winship* principle. *Id.* at 157. Thus, for example, it is well established that a presumption that shifts the burden of persuasion to a defendant—*i.e.*, one that directs a jury to conclusively presume an elemental fact unless the defendant adduces sufficient evidence to disprove it—violates due process. *Francis* v. *Franklin*, *supra*, 471 U.S. at 317. The question we address here is whether a closely related form of mandatory presumption—*i.e.*, one that directs a jury to conclusively presume an elemental fact unless the defendant offers some evidence to support its non-existence—is equally infirm.[16]

We believe that question should be answered in the affirmative in the circumstances of this case. In reaching

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[16] Presumptions of this nature are said to shift the "burden of production." Some courts prefer to describe the same phenomenon as shifting the "burden of going forward." In an area of law not known for the precision of its definitions, the terms appear to be synonymous. The latter formulation, however, seems to be preferred when a party starts out with the burden, as opposed to having it "shifted" to him at some point in the proceedings.

this conclusion, we begin with the observation that a presumption that shifts the burden of production is functionally identical to one that impermissibly shifts the burden of persuasion. In both instances, the jury is told that it *must* presume one or more elements of a crime from proof of a predicate fact unless the defendant offers evidence in rebuttal. Although the quantity of evidence that must be adduced to defeat the presumption is different in each case, a presumption that shifts the burden of production would thus appear to be unconstitutional for precisely the same reasons as one that shifts the burden of persuasion: in both instances, the presumption relieves the prosecution of its Fourteenth Amendment duty to prove each element of a crime beyond a reasonable doubt. Moreover, in both cases the practical consequence of imposing the burden on the defendant is the same: the prosecution can survive a motion to acquit, even if it has offered no evidence whatever pertaining to one or more elements of the crime.

Notwithstanding these close parallels, the analogy between a presumption that shifts the burden of persuasion and one that shifts the burden of production is imperfect in one significant respect. Whereas in the former case the defendant must actually disprove the presumed fact, in the latter, he or she need not go that far. In order to dissipate the presumption, the defendant need only adduce "some" evidence or, as in California, sufficient evidence "to support a finding of [the presumed fact's] nonexistence." Cal. Evidence Code § 604. Thus, while the precise weight of the burden may vary depending on the applicable state-law formulation, it is by definition less onerous to satisfy a burden of production than a burden of

persuasion.[17] The essential question then is whether and, if so, in what circumstances, this distinction spares presumptions that shift the burden of production from the constitutional condemnation that attends all other forms of mandatory presumptions.

Consistent with the Court's prior intimations, we agree that the difference in the weight of the defendant's burden is a proper consideration to weigh in the balance and, further, that the distinction is sufficiently important to preclude a categorical prohibition against presumptions that operate to shift the burden of production.[18] At the same time, as the Court has also suggested, because such presumptions *do* relieve the prosecution of its duty to prove each element of its case beyond a reasonable doubt,

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[17] In point of fact, the somewhat cryptic California formulation appears to impose a significantly heavier burden on the defendant than the parallel formulation in most other states. As a general rule, a defendant satisfies the burden of production if he or she adduces "any" evidence or "some" evidence bearing on the non-existence of the presumed fact. Self evidently, the greater the burden a defendant must carry to satisfy the burden of production, the more it approximates an impermissible burden of persuasion.

[18] As noted above, the Court has twice reserved decision on the constitutionality of presumptions that shift the burden of persuasion. *See supra* p. 15. On two recent occasions, however, the Court alluded to the issue in dictum. In *County Court of Ulster County* v. *Allen*, 442 U.S. at 157 n.16, the Court suggested that an "extremely low burden of production," *e.g.* one that could be satisfied by "any evidence" may have no greater "impact than . . . a permissive inference." *See also Mullaney* v. *Wilbur*, 421 U.S. 684, 701-02 nn. 28 & 30 (1975) (suggesting that a State could require the defendant to produce some evidence of "heat of passion" before the prosecution was required to negate it beyond a reasonable doubt). As explained *infra*, we do not disagree that a defendant may, consistent with due process, be made to bear the burden of production on "heat of passion."

there are plainly limits to a state's discretion in this regard. *See Tot* v. *United States*, *supra*, 319 U.S. at 469 (citing *McFarland* v. *American Sugar Refiners*, 241 U.S. 79, 86 (1915)). Even if the presumption only shifted the burden of production, for example, there can be little doubt that a state could not direct a jury to presume guilt from the return of the indictment itself. *Id.*

As we now explain, we think these limits are best defined by reference to two related considerations: the underlying purpose of burdens of production and the substantive nature of the elemental fact the jury is directed to presume. To the extent requiring a defendant to go forward with evidence serves the legitimate function of notifying the court and the prosecution that the presumed fact is in issue, it will pass constitutional muster. Where, however, the presumed fact is *already* in issue—as will generally be the case for elements of the offense and will always be the case for such core elements as intent or the *actus reus*—the only purpose of shifting the burden of going forward to the defendant is to enable the prosecution to secure a conviction without proving its case. Because that objective is inherently illegitimate, the use of a burden shifting presumption in such cases is patently impermissible.

1. Requiring The Defendant To Produce Evidence Tending To Negate An Element Of A Crime Serves No Legitimate State Interest And Therefore Will Generally Violate Due Process.

Although the device is employed in a variety of contexts, requiring a criminal defendant to "go forward" with evidence on an issue serves a single, rather straightforward procedural objective. By producing evidence pertaining to the issue, the defendant gives notice to both the court and the prosecution that he intends to rely on some statutorily authorized consideration—not otherwise in

the case—that bears on either the fact or degree of his culpability. To the extent allocating the burden of production to the defendant serves that function, it promotes efficient litigation by screening out issues that are extraneous to the case.[19] That objective, we acknowledge, is not only legitimate, but will generally serve as an effective counterpoise to any burden the device may impose on the defendant's Fourteenth Amendment rights.[20]

The principle is well illustrated by the operation of traditional affirmative defenses. In most jurisdictions, the defendant bears the burden of going forward with respect to such matters as duress, necessity or self defense. By introducing evidence pertaining to such defenses, the defendant serves notice that the facts of the case give rise to a triable issue that—although not an element of the crime—bears directly on culpability. Because the constitutent elements of the offense do not change at any point in the process, an affirmative defense is, by definition, "extraneous" to the crime charged in the indictment.[21] Requiring the defendant to inject the issue

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[19] *See* Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1334 (1979).

[20] While the details of the analysis may vary from case to case, Due Process claims invariably reduce to a determination of the "fundamental fairness" of the procedures that led to the deprivation of life, liberty or property. In making that determination, it is often appropriate to consider the interests of both the affected party and the state. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

[21] This is so even where success in carrying the burden of production shifts the burden of persuasion to the State to disprove the defense—*e.g.*, to prove the absence of self defense. That the state must, as a matter of allocation, disprove a defense does not suggest that the absence of the defense is an element of the crime. As the term has developed in this Court's cases, an affirmative defense is, by definition, not an element of the crime. *See, e.g.*, *Martin* v. *Ohio*, 480 U.S. 228, 233 (1987); *Patterson* v. *New York*, 432 U.S. 197, 205-06 (1977).

into the case thus serves the salutary, and entirely permissible, function of identifying the full universe of issues the trier of fact must resolve in order to determine guilt or innocence.[22]

To the same effect is the rule that a defendant is not entitled to a lesser included offense instruction unless he or she adduces some evidence suggestive of the less serious crime. *See, e.g., Hopper* v. *Evans*, 456 U.S. 605 (1982).[23] As with an affirmative defense, evidence pertaining to the lesser crime is, by definition, extraneous to the crime charged. *Sparf* v. *United States*, 156 U.S. 51, 63-64 (1895). Putting the burden on the defendant to produce evidence bearing on the lesser offense thus serves the function of delineating the full range of triable issues in the case. In light of the important interest served by this procedural allocation, the burden on the defendant's right to such a charge is constitutionally tolerable.

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[22] Although, to our knowledge, this Court has never squarely addressed the issue, it has never doubted that a state could place the burden of production on the defendant with respect to an affirmative defense. *See, e.g., United States* v. *Bailey*, 444 U.S. 394 (1980) (duress and necessity). Since a state can require the defendant to carry the burden of persuasion on an affirmative defense, *see Martin* v. *Ohio*, *supra*, it would appear to follow *a fortiori* that it may permissibly require him or her to bear the less onerous burden of production in this context. The only limitation would be with respect to those culpability-related considerations that, as a matter of substantive law, could not be denominated an affirmative defense. *See, Patterson* v. *New York*, *supra*, 432 U.S. at 210; *McMillan* v. *Pennsylvania*, 477 U.S. 79, 100 (1986) (Stevens, J., dissenting).

[23] In capital cases, due process requires a lesser included offense charge when the evidence warrants it. Although the Court has never held that the same rule is constitutionally mandated in other contexts, state and federal courts uniformly apply the identical standard as a matter of common law and statutory interpretation. *See Beck* v. *Alabama*, 447 U.S. 625, 636 n.12 & 637 (1980).

Where, however, the defendant is required to bear the burden of production on an element of the crime—a matter that by definition is *not* extraneous to the case—the allocation necessarily stands on an entirely different footing. Self evidently, requiring the defendant to go forward with evidence in this context does not serve the interest of defining the full set of issues in the case: between the indictment and any affirmative defenses brought to the court's attention, that function has already been fully accomplished. Nor, of course, can the allocation be defended as a means of identifying those issues for which there is sufficient evidence to justify submission to the trier of fact. Because it is never permissible to direct a verdict against a defendant in a criminal case, the quantity or quality of the evidence tending to negate one or more elements of the crime is procedurally irrelevant. *See Rose* v. *Clark*, *supra*, 478 U.S. at 578; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 516 n.5.

In short, when the defendant must go forward with evidence tending to negate an element of the offense—and where the consequence of failing to carry the burden is to have the matter conclusively presumed against him—the device furthers none of the interests traditionally associated with burdens of production. Indeed, the *only* apparent function of such burden shifting presumptions is to help the prosecution obtain a conviction without directly proving its case—an objective that runs directly counter to both the letter and intent of *In re Winship*.[24]

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[24] That the defendant may have more ready access to information pertaining to the matter is not a sufficient justification for the allocation. *See Tot* v. *United States*, *supra*, 319 U.S. at 469. Such a rule would, of course, prove too much. A defendant virtually always has more direct evidence pertaining to the crime than the prosecution—especially on such basic matters as intent and the *actus reus* itself. *Id.*

A rule whose only purpose is to circumvent a constitutional right cannot be defended on those grounds. Like any other form of mandatory presumption, a device that conclusively presumes an element of a crime if the defendant fails to produce evidence to the contrary compromises the right to have the prosecution prove its case beyond a reasonable doubt. Because the infringement serves no legitimate countervailing state interest, presumptions that shift the burden of production on an element of a crime will generally deprive a defendant of due process of law.

We say "generally," because the relative ease with which the defendant can carry a burden of production—unlike a burden of persuasion—warrants some softness around the edges of an otherwise categorical rule. There may well be some matters, technically denominated "elements" under the applicable state scheme, for which a defendant can be required to bear the burden of production. Thus, for example, where a state makes absence of "heat of passion" or some other mitigating consideration an element of the crime—rather making the obverse an affirmative defense—requiring the defendant to come forward with enough evidence to put the matter in issue has

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Yet that consideration has never been thought to justify evidentiary allocations in derogation of the principle of *In re Winship*. *See, e.g.*, *Francis* v. *Franklin*, *supra* (intent).

Nor can placing the burden of production on the defendant be justified as a legitimate "discovery" device—*i.e.* a means of informing the prosecution of the details of the defense so that it can develop and structure its case accordingly. *Compare* F.R. Crim. P. 12.1 (requiring Defendant to give notice of alibi witnesses as precondition to presenting their testimony at trial). By definition, the prosecution's case is already completed by the time the defendant is even put to the task of "going forward" with evidence.

some intuitive appeal. Regardless of where they are formally housed in the state scheme, such issues are not in the ordinary run of cases and, therefore, as a matter of both fairness and history, it may well be permissible to "presume" their non-existence absent some evidence to the contrary.[25]

Whatever the scope of such exceptions may be, however, we think it clear that they do not extend to such core elements of criminality as intent or the *actus reus*. One or both of these elements is typically, if not invariably, the only matter contested at trial. When an issue is already the centerpiece of the proceedings, requiring the defendant to bear the burden of production—or have the matter conclusively presumed against him—compromises the *Winship* right substantially while serving no rational purpose. In our view, the inherently superfluous quality of

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[25] The authors of the Model Penal Code propose a similar line. Under their formulation, a criminal defendant may be required to introduce some evidence of an affirmative defense in order to inject it into the case. A defense is considered "affirmative" if the applicable code so provides or if "it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." ALI, Model Penal Code § 1.12(3) (1985). *Cf. McMillan* v. *Pennsylvania*, *supra*, 477 U.S. at 99 (Stevens, J., dissenting) (suggesting that state may define as an affirmative defense matters that tend to mitigate seriousness of the offense). With respect to other forms of presumptions—*i.e.*, those not pertaining to an affirmative offense—the Model Penal Code requires that the jury be charged as follows:

> while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury *may* regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

ALI, Model Penal Code § 1.12(5)(b) (emphasis added). Thus, for elements of the offense, the jury is told that it may, but need not, infer the elemental fact from the predicate.

the device in this context—in combination with the significant burden on the right—gives rise to a general rule that presumptions that shift the burden of production on either of these essential elements deprive a defendant of due process of law.[26]

2. The Operation Of The Statutory Presumptions In The Particular Circumstances Of This Case Underscore Their Unconstitutionality.

Under this analysis, neither Vehicle Code § 10855 nor Penal Code § 484(b) survive scrutiny under the Due Process Clause. Both presumptions direct the jury to con-

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[26] It is no answer to suggest that an otherwise impermissible presumption is valid if—consistent with the substantive limitations imposed by the Eighth and Fourteenth Amendments—the legislature could have excluded the presumed element from its definition of the crime. The Court has specifically rejected such reasoning on at least two occasions. *See Tot* v. *United States*, *supra*, 319 U.S. at 472 (noting that "for whatever reason" Congress chose to define the crime as it did, and holding that the constitutional analysis would therefore have to take the statute as it found it, not as it might have been drafted). *See also Leary* v. *United States*, *supra*, 395 U.S. at 34 (same). Indeed, if accepted, the "greater power-inlcudes-the-lesser" argument would have required a different result in both *Sandstrom* and *Franklin*—a State could almost certainly punish as murder conduct the natural and probable consequence of which is the death of another. *Cf. Tison* v. *Arizona*, 481 U.S. 137 (1987).

Moreover, predicating the constitutional analysis on the legislature's actual definition of the crime makes sense as a matter of procedural due process. The elements of a crime define the set of conditions that, if present, justify a deprivation of liberty. Thus, the statutory definition of the crime generates an enforceable expectation—itself protected by the due process clause—of a continued entitlement to freedom so long as one or more of such elements is lacking. Because the entitlement is defined by the statute itself, what the legislature "might have done" is irrelevant to the requirements of due process.

clusively presume specific intent unless the defendant adduces sufficient evidence to "support" the element's non-existence. Indeed, the former goes even further by directing an equivalent presumption with respect to *every* element of the offense of theft by embezzlement—including both specific intent and the *actus reus*. While we have difficulty imagining an application of either statute that would withstand a challenge under the Due Process Clause, as we now explain, their unconstitutionality is especially apparent in the particular circumstances of this case.

Even if one accepts the conclusion that appellant offered no evidence to support the "nonexistence of the presumed facts," there can be no doubt that those matters were hotly contested throughout the trial.[27] JA 61. Because appellant's retention of the car beyond the contract date was not in dispute, the *only* issue in the case was whether he had specifically intended to steal it. More particularly, the case turned on whether appellant had intended to retain the car permanently—the element that distinguishes grand theft from a violation of Vehicle Code § 10851.

As a review of the record makes clear, appellant made every effort to address these crucial issues at each stage of the proceedings. In his motion to dismiss the complaint, he explicitly denied having the requisite intent. JA 26-27. And, at trial, the testimony he elicited from both of his

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[27] Focusing exclusively on appellant's "testimony," the appellate court did not consider or reject the possibility that the *State's* witnesses provided evidence supporting "the non-existence of the presumed facts." As we point out below, at least one aspect of the State's evidence was inconsistent with an intent to keep the car permanently. *See infra* p. 39.

witnesses was plainly designed to support that contention. *See supra* pp. 5-7. Finally, and most telling of all, the jurors' query concerning the operation of the presumptions indicates that they, at least, understood that the case revolved around the disputed (and close) issue of appellant's intent to "*permanently*" deprive the owner of possession. JA 23 (emphasis in original). Indeed, the only reasonable inference to be drawn from this last-minute inquiry is that, without the benefit of the presumptions, the State had failed to prove the requisite intent to the jury's satisfaction.

This brief review of the proceedings, in our view, makes two points abundantly clear. First, requiring appellant to go forward with evidence to negate the presumption of intent did not serve the functional objective of injecting the issue into the case—both the Court and the prosecution were *already* on notice that that precise issue would be the focus of the entire trial, as indeed it was. Second, there is every reason to believe that the presumptions not only made a difference in the outcome, but did so in a manner directly at odds with the "bedrock, axiomatic and elementary" Fourteenth Amendment principle that the State must prove every element of the offense beyond a reasonable doubt. *In re Winship*, *supra*, 397 U.S. at 363-64 (internal quotations omitted). Whatever may be the general rule concerning presumptions that shift the burden of production, their operation in the circumstances of this case deprived appellant of due process of law.

B. The Absence Of A Sufficient Connection Between The Predicate And Presumed Facts Renders Vehicle Code § 10855 Independently Unconstitutional.

In addition to complying with the specific mandate of *In re Winship*, criminal presumptions must satisfy a second

requirement to comport with due process. Even if the presumption serves only to shift the burden of production, the logical connection between the predicate and the presumed facts must, at minimum, be sufficiently tight to guard against an irrational jury verdict. *See Tot* v. *United States*, *supra*, 319 U.S. at 467-69; *see generally County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 163-67. While existing case law leaves some doubt as to the precise standard to be applied in this context, Vehicle Code § 10855 fails under even the most forgiving formulation of the test.[28]

Even when a presumption merely authorizes a permissive inference—that is where the jury is told that it may, but need not, infer an elemental fact from proof of a predicate—due process requires a "rational connection" between the proven and the inferred facts. *See United States* v. *Gainey*, 380 U.S. 63, 66 (1965). Under the controlling test, presumptions of this nature are invalid "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States*, *supra*, 395 U.S. at 36. *See also*, *Barnes* v.

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[28] While we believe that Penal Code § 484(b) is equally infirm, we focus exclusively on Vehicle Code § 10855 for two related reasons. First, the relationship between the presumed and predicate facts is even more tenuous for the latter than for the former. Thus, if the Court disagrees with our submission and upholds Vehicle Code § 10855, a similar conclusion with respect to Penal Code § 484(b) would appear to follow *a fortiori*. Second, if Vehicle Code § 10855 falls, the constitutionality of the latter provision would be irrelevant. Where, as here, it is impossible to know which of two provisions a jury may have relied on, the fact that one may be constitutional does not save the verdict if the other was not. *Bachellar* v. *Maryland*, 397 U.S. 564, 569-71 (1970).

United States, 412 U.S. 837, 842 (1973); *Turner* v. *United States*, 396 U.S. 398, 404-05 (1970).

Mandatory presumptions, in contrast, must satisfy a significantly more stringent standard. In such cases, the jury is *directed* to rely on the presumption—*i.e.*, to find an element of the offense from proof of a non-elemental fact. Because such presumptions necessarily implicate the *Winship* right, due process requires a far tighter connection between the predicate and presumed facts. As the Court has suggested on a number of occasions, presumptions of that nature are invalid unless "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 167.[29] Any lesser showing would permit the prosecution to obtain a conviction even though it had not proved its case to the requisite level of certainty.[30]

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[29] *See also Barnes* v. *United States*, *supra*, 412 U.S. at 845-46 (finding presumption permissible under "reasonable doubt standard"); *Leary* v. *United States*, *supra*, 395 U.S. at 36 n.64 (declining to decide whether presumption must satisfy reasonable-doubt standard since it failed even the "more likely-than-not" test); *Turner* v. *United States*, *supra*, 396 U.S. at 416 (holding that presumption failed under either standard).

[30] In point of fact, the more stringent formulation is largely redundant of—and may have been superseded by—the generic condemnation of mandatory presumptions in *Sandstrom* v. *Montana* and *Francis* v. *Franklin*. The two lines of cases could be read together to suggest that mandatory criminal presumptions are intrinsically unconstitutional unless the predicate fact is so suggestive of the element that the connection can be inferred beyond a reasonable doubt. The inquiry would look to the "presumption's accuracy in the run of cases" and not to the circumstances of the particular case before the court. *County Court of Ulster County*, *supra*, 442 U.S. at 159. As explained in text, the inference directed by Vehicle Code § 10855 falls far short of satisfying that standard.

While we believe that the statutory presumptions at issue in this case—like any other form of mandatory presumption—warrant analysis under the more demanding of the two tests, there is no reason to decide that issue here.[31] Even if the appropriate measure were the test articulated in *Leary* v. *United States*, *supra*, it cannot be "said with substantial assurance that the presumed fact"—intent to deprive the owner of *permanent* possession—"is more likely than not to flow from the proved fact"—willful retention of the vehicle more than five days beyond the contract date. 395 U.S. at 36.

There are obviously a host of reasons—well short of felonious intent—that might lead a customer to willfully retain a rental car five days beyond the designated due date. Undoubtedly the most common is a change in business plans coupled with the natural, although perhaps mistaken, perception that the rental car company would be largely indifferent to a few extra days provided that the appropriate fee is paid upon return.[32] It is not our intention to defend either the accuracy of the perception or the appropriateness of the conduct based upon it. We do believe, however, that it is sufficiently commonplace to undermine the rationality of a scheme that categorically

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[31] Regardless of whether the instructions were triggered by appellant's failure to carry the burden of production, the jury was explicitly directed to presume an element of the offense from proof of a predicate. Thus, unless it could be shown that the presumed fact followed virtually inescapably from proof of the predicate, the charge relieved the prosecution of its obligation to prove every element of the offense beyond a reasonable doubt.

[32] To give but one example, Washington Post reporter Carl Bernstein reportedly became so ensconced in an investigation that he left a rental car in a garage for two months. Thompson, *Red-Diaper Bernstein*, Vanity Fair, Mar. 1989 at 94.

presumes embezzlement—including the constitutent element of specific intent to steal—solely from a deliberate failure to return the car within five days of the formal expiration of the contract.

In this regard, the particular circumstances of this case—specifically, the fact that appellant retained the car for considerably more than five extra days—are irrelevant to the constitutional inquiry.[33] As the Court made clear in *County Court of Ulster County*, 442 U.S. at 157-59, challenges to the rationality of mandatory presumptions are necessarily facial. Because "the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and [is] based on the presumption's accuracy in the run of cases." *Id.* at 159. Given this generic focus, the only pertinent question is whether failure to return a rental vehicle within five days of its due date "is more likely than not" to suggest a felonious intent to keep it permanently. Because that question can only be answered in the negative, the logical connection between the predicate and presumed facts set out in Vehicle Code § 10855 is far too tenuous to survive scrutiny under the Due Process Clause.

In sum, as in both *Sandstrom* and *Franklin*, the dispositive question in this appeal is whether the jury would have reasonably interpreted the trial court's charge as directing an impermissible conclusive presumption. As appellee has twice conceded, that question must be

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[33] While these facts may bear on the separate issue of harmless error, they have no relevance to the necessarily antecedent issue of the existence of the violation itself.

answered in the affirmative. But even if the appropriate analytic focus were the facial validity of Vehicle Code § 10855 and Penal Code § 484(b), they would not survive scrutiny under the Due Process Clause. By requiring the defendant to go forward with evidence to negate the central element of specific intent, they impose an unacceptable burden on the right delineated in *In re Winship*. Moreover, at least with respect to Vehicle Code § 10855, the inference it directs is insufficiently rational to satisfy the demands of due process.

III. EVEN IF *CHAPMAN* v. *CALIFORNIA* IS APPLICABLE IN THIS CONTEXT, THE CONSTITUTIONAL ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Having conceded that the trial court's instructions pursuant to Vehicle Code § 10855 and Penal Code § 484(b) directed an impermissible conclusive presumption, appellee contends that the conviction may still stand because the error was "harmless." Motion to Dismiss at 10-11. The argument must fail for two independent reasons. First, unlike mandatory *rebuttable* presumptions, *see Rose* v. *Clark*, *supra*, an instruction that directs a jury to conclusively presume an element of an offense is not even subject to harmless-error analysis. Second, even if the error were an appropriate subject for such review, appellee cannot possibly demonstrate on this record that it was "harmless beyond a reasonable doubt." *Chapman* v. *California*, *supra*, 386 U.S. at 24.

A. Since The Trial Court Instructed The Jury to Conclusively Presume Embezzlement From A Non-Elemental Fact, The Violation Is Not Subject To Harmless-Error Review.

In the sections above, we suggest that the statutory presumptions at issue in this appeal are unconstitutional

under either of two theories. Part II contends that, even if the appropriate inquiry were whether a state may permissibly shift the burden of production on an element of an offense, Vehicle Code § 10855 and Penal Code § 484(b) violate the due process principles of *In re Winship* and *Leary* v. *United States*. Our principal submission, however, is that—regardless of the intended operation of the challenged provisions—the instructions premised on them impermissibly directed appellant's jury to presume his guilt from proof of a non-elemental fact. *See supra*, pp. 12-16. If, consistent with its prior decisions, the Court agrees that the case is appropriately analyzed in these latter terms, we doubt that the violation is even subject to harmless-error review.

Unlike a mandatory *rebuttable* presumption, an instruction that directs a jury to conclusively presume guilt from proof of a predicate fact is analytically identical to a directed verdict. *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 516 & 516 n.5; *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 435, 446. *Morissette* v. *United States*, *supra*, 342 U.S. at 274-75. The circumstances of this case illustrate the point well. By instructing appellant's jury to presume embezzlement from failure to return the car within five days of the contract date—a fact that was not contested—the court removed the issue of guilt from the jury's consideration as effectively as if it had declined to submit it altogether.[34]

In this crucial respect, the present case is distinguishable from *Rose* v. *Clark*, *supra*. There, respondent's jury had been instructed to presume malice from proof of a killing, but had been further instructed that "the pre-

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[34] The law presumes that jurors follow the instructions they are given. *Francis* v. *Franklin*, *supra*, 471 U.S. at 324 n.9.

sumption [could] be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State." 478 U.S. at 574. Although unconstitutional for other reasons, *see Francis* v. *Franklin*, *supra*, instructions of that nature do not have the effect of "automatically directing a finding" on any or all elements of the offense. *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 516. Unlike the instant case, those essential matters were given to Clark's jury and remained in its hands throughout its deliberations.

The distinction between the mandatory conclusive presumption presented to appellant's jury and the mandatory rebuttable presumption at issue in *Rose* v. *Clark* is central to assessing the appropriateness of harmless-error analysis.[35] In the latter context, the error lies in the possibility that the prosecution failed to shoulder the full burden mandated by *In re Winship*. As *Rose* v. *Clark* makes clear, that possibility becomes legally irrelevant if the evidence is so suggestive of the presumed fact "that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." 478 U.S. at 583. Mandatory conclusive presumptions, in contrast, suffer from an additional infirmity. Since the presumption serves to take the matter from the jury altogether, "the error in such . . . case[s] is that the wrong entity judged the defendant guilty." *Id.* at 578. Because a defendant in a serious criminal case is entitled to have the jury determine guilt or innocence—regardless of the weight of the evidence—such errors are, by their very nature, prejudicial. For that reason, as the Court has

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[35] *See Rose* v. *Clark*, 478 U.S. at 591 n.2 (Blackmun, J., dissenting) (noting that decision only concerns rebuttable presumptions).

already observed with respect to directed verdicts, errors with this impermissible effect can never be harmless. *Id.*[36]

B. The Error Was Not Harmless Beyond A Reasonable Doubt.

Even if the Court were to conclude that the violation is subject to harmless-error analysis, the result would be the same.[37] "*Chapman* mandates consideration of the entire record" to determine whether an error is harmless beyond a reasonable doubt. *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983). *See also*, *Rose* v. *Clark*, *supra*, 478 U.S. at 583. Review of the full record in this case shows two things with unusual clarity. First, the State's evidence on the dispositive issue of appellant's intent to retain the car *permanently* was equivocal at best. Second, the jury explicitly recognized the equivocal nature of the evidence and, for that reason, *did* find it "[n]ecessary to

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[36] A number of states, including California, have concluded that a mandatory conclusive presumption, "having removed an element of the crime from consideration by the jury, is reversible per se." *People* v. *Hedrick*, 105 Cal. App. 3d 166, 172, 164 Cal. Rptr. 169, 172 (3d Dist. 1980). *Accord*, *Vermont* v. *Martell*, 143 Vt. 275, 465 A.2d 1346 (1983).

[37] Contrary to appellee's suggestion in its Motion to Dismiss, the Appellate Department's conclusion that "substantial evidence supports [the] conviction" can hardly be construed as a determination that the error was harmless beyond a reasonable doubt. JA 61. Having found no error, the court below had no occasion to undertake a harmless-error analysis, and did not do so. Even though the issue was not addressed below, the record so clearly demonstrates that the error was prejudicial that no purpose would be served by a remand on this issue. This is especially so since there is no trial transcript available for review. *See supra*, n.11. Thus, the court below is not in an appreciably better position than this Court to undertake the harmless-error inquiry in the first instance.

rely on the presumption." *Rose* v. *Clark*, *supra*, 478 U.S. at 583.

As will typically be the case with *mens rea*, the prosecution adduced no direct evidence suggesting that appellant specifically intended to deprive the owner of permanent possession of the car. While the circumstantial evidence may have been sufficient to *permit* the jury to infer such an intent, hardly is the inference so "overpowering" that "no rational jury" would fail to draw it. *Rose* v. *Clark*, 478 U.S. at 580-81.

Indeed, in several important respects the evidence pointed towards the opposite conclusion. Thus, for example, it was undisputed that the car was found at the local business address provided by appellant at the time he executed the contract. Surely a person who intends to abscond with a rental car permanently would not keep it at an address where he could be so easily traced—particularly if, as the prosecution alleged, he knew that the owner was endeavoring to contact him.

To the same effect was the testimony of Paula Pfister. As recounted in the Settled Statement on Appeal, she testified that more than two weeks after the expiration of the rental agreement, she accompanied appellant to a location "close to the MPG rental office" at a time when he had "a large amount of cash with him." JA 38. Thus, the record is clear that the jury knew of an excursion that placed appellant near the offices of the rental car company with the means to pay his debt upon return of the car. Although one must look to a subsequent affidavit for *her* explanation of the linkage between these facts—*i.e.*, that appellant "had substantial monies with him . . . for the purpose of making further and additional payments on his account"—such an explicit statement was unnecessary

for the jury to draw this obvious conclusion from the testimony she presented. JA 66. Thus, even if her testimony is cast in the self-serving light of the Settled Statement, *see supra* n.8, it is sufficient to generate a reasonable doubt concerning appellant's intent.

Moreover, quite aside from the weight of the evidence, there is every indication in the record that the jury actually *did* harbor reasonable doubt concerning the element of intent. In the second day of its deliberations, the jury posed two related questions: (1) whether grand theft "included the legal requirement of *permanent* deprivation of possession;" and (2) whether it is "considered permanent if he keeps the car over 5 days of the contract date [,] [o]r 30 days." JA 23 (emphasis in original). After the trial judge re-read the offending instructions, the jury deliberated for nine additional minutes and then found appellant guilty of grand theft. As this Court has already observed in remarkably similar circumstances, this "course of events" is fatal to any suggestion that "the jury paid no attention [to the] misdirection." *Bollenbach* v. *United States*, 326 U.S. 607, 611 (1946).[38] To the contrary, the jurors' eleventh-hour query permits only the opposite inference: that the State's proof left them with substantial

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[38] In *Bollenbach*, the jury deliberated for seven hours and then sought clarification from the court on the meaning of its instructions. The query elicited a supplemental charge that contained an impermissible presumption. Five minutes later, the jury returned a verdict of guilty. 326 U.S. at 610. Responding to the government's argument that the faulty charge had made no difference, the Court stated:

> We can pay no attention to this misdirection only by assuming that the jury paid no attention to it and that the case is before us as though no misdirection had been given. *To do so is to disregard the significance of the course of events, as revealed by the record, after the case went to the jury.*

326 U.S. at 611 (emphasis added).

doubts about the level of appellant's intent; and that, having been re-instructed to rely on the improper presumptions to resolve the matter, they proceeded to do so.

Under these circumstances, appellee cannot carry *its* burden of proving that the error was harmless. As the jury's last minute inquiry confirms, the evidence pertaining to the crucial element of specific intent was anything but "dispositive"—and is surely insufficient to allow a "reviewing court [to] say beyond a reasonable doubt that the jury would have found" such intent even without the benefit of the presumptions. *Rose* v. *Clark*, *supra*, 478 U.S. at 583. Indeed, given the substantial indications that the jury *did* "rely on the presumption[s]," there is no need to even speculate on the matter. *Id.* Because, as appellee concedes, the trial court's directions to the jury were unconstitutional, and because those directions plainly made a difference in the outcome of the trial, appellant's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Appellate Department should be reversed.

Respectfully submitted,

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